SUPREME COURT, U. S.

FEB 6 1976

MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-885

DIAMOND INTERNATIONAL CORPORATION, *Petitioner*,

v.

MARYLAND FRESH EGGS, INC., *Respondent*.

PETITIONER'S REPLY TO RESPONDENT'S BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

KARL W. FLOCKS
SHERIDAN NEIMARK
Munsey Building
Washington, D.C. 20004
202—393-2717
Attorneys for Petitioner

Of Counsel:

JOHN W. AVIRETT, 2d
Baltimore, Maryland

SUMNER S. KITTELLE
Naples, Florida

KENYON & KENYON REILLY CARR & CHAPIN
New York, N. Y.

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Respondent's Brief in Opposition to the Petition completely fails to address itself to the issues raised by the Petition. It does not address itself to the certiorari policy of this Court or to the effect that policy has had on the standards of patentability being applied by the lower courts. Respondent ignores the

evidence and misstates the facts. Respondent's Brief argues only Respondent's distorted view of the merits of its case.

The question is not what will be the ultimate result of review by this Court, but whether that review should be granted. More particularly, the question is whether the instant case is the appropriate vehicle to begin to carry this Court away from its monolithic certiorari policy of reviewing lower court patent *validity* holdings to the virtual exclusion of reviewing patent *invalidity* holdings.

Petitioner contends that the instant case is the ideal vehicle to reverse the pattern of forty years of unreviewed lower court patent invalidity holdings which resulted in their being cloaked with an unwritten and unjustified presumption of correctness, because:

1. The case raises corollary issues to those which this Court has agreed to review in *Sakraida* v. *AG Pro, Inc.*, No. 75-110, 96 Sup. Ct. 186 (1975). However, as in the past forty years, the *AG Pro* case again involves review of a lower court patent validity holding. The important issue of the standard to be applied in judging combination patents will be better elucidated if this Court also reviews that issue in the context of the lower court patent invalidity holding of the instant case.

2. This case has a major effect on an entire industry since virtually all cartoned eggs sold in the United States are sold in the patented egg carton, both by Petitioner, and by those like Respondent, who promptly discarded their own cartons and copied Petitioner's after it appeared on the market.

3. This case presents much more than the simplified picture of the merits attempted in Respondent's Brief. This case sets forth the picture of an industry which struggled for an appropriate solution until presented with the Reifers invention, an invention still in use by the entire industry more than twenty years after its introduction. The District Court, which heard the live testimony and viewed the demeanor of the witnesses, recognized the complex and elusive problems which confronted Reifers and paid tribute to his unique solution by twice holding the patent valid after two full trials against two different defendants.

4. In contrast, the Court of Appeals had no appreciation of the problems faced by those in the egg carton art, and therefore completely failed to address itself to the question of the synergistic result achieved by the patentee's unique combination of elements. The Court of Appeals looked only at the *individual elements* of the combination, not the results of the combination. In so doing it made a fundamental error which is likely to be repeated by other courts, fortified by the knowledge that their erroneous invalidity holdings stand even less than the usual chance of being reviewed by this Court.

Petitioner does not urge a "quota system" of review as alleged by Respondent, but only a balanced pattern of certiorari review in patent cases to provide balanced guidance to the courts below so that this Court's authority is exercised over lower court errors which lead to valid patents being held invalid, just as it has been in the last forty years over errors which lead to invalid patents being held valid.

CONCLUSION

It is therefore respectfully submitted that the Petition For A Writ Of Ceriorari To The United States Court Of Appeals For The Fourth Circuit should be granted.

Respectfully submitted,

KARL W. FLOCKS
SHERIDAN NEIMARK
Munsey Building
Washington, D.C. 20004
202—393-2717

Attorneys for Petitioner

Of Counsel:

JOHN W. AVIRETT, 2d
Baltimore, Maryland

SUMNER S. KITTELLE
Naples, Florida

KENYON & KENYON REILLY CARR & CHAPIN
New York, N. Y.

Certificate of Service

Service of the foregoing Petitioner's Reply to Respondent's Brief in Opposition was made on respondent by mailing three copies thereof, first class postage prepaid on February 6, 1976, to Herbert C. Brinkman, Esq. and Richard H. Evans, Esq., c/o Wood, Herron & Evans, 2700 Carew Tower, Cincinnati, Ohio 45202.

KARL W. FLOCKS